Filed 10/31/16 P. v. Johnson CA5

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

LARRY JOHNSON,

Defendant and Appellant.

F072040

(Super. Ct. Nos. 548668-3, 252594-7, 404396-4)

OPINION

THE COURT*

APPEAL from a judgment of the Superior Court of Fresno County. Denise Lee Whitehead, Judge.

Theresa Osterman Stevenson, under appointment by the Court of Appeal, for Defendant and Appellant.

Office of the State Attorney General, Sacramento, California, for Plaintiff and Respondent.

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* Before Poochigian, Acting P.J., Peña, J. and McCabe, J.†

† Judge of the Superior Court of Merced County, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

Appointed counsel for defendant Larry Johnson asked this court to review the record to determine whether there are any arguable issues on appeal. (*People v. Wende* (1979) 25 Cal.3d 436.) Defendant was advised of his right to file a supplemental brief within 30 days of the date of filing of the opening brief. He responded with a letter, arguing that the prosecution bore the burden of proving the value of the stolen property in response to his petition under Proposition 47 (Pen. Code, § 1170.18).[1] Finding no arguable error that would result in a disposition more favorable to defendant, we affirm.

We provide the following brief description of the facts and procedural history of the case. (See *People v. Kelly* (2006) 40 Cal.4th 106, 110, 124.)

On February 27, 2015, acting in propria persona, defendant petitioned the trial court pursuant to Proposition 47 to reduce three felony convictions—a 1980 conviction for receiving stolen property (§ 496), a 1990 conviction for first degree burglary (§ 459), and a 1996 conviction for first degree burglary (§ 459)—to misdemeanors.

On June 15, 2015, the trial court denied the petition as to the two first degree burglary convictions because the offenses were not eligible for relief under section 1170.18. As to the receiving stolen property conviction, defense counsel told the trial court that he did not believe defendant would be able to establish the value of the stolen property. Counsel agreed to withdraw the petition without prejudice. The court said counsel could put the petition back on the calendar if he found a way to determine the value of the property.

On July 21, 2015, defendant filed a notice of appeal.

DISCUSSION

On November 4, 2014, California voters enacted Proposition 47, the Safe Neighborhoods and Schools Act, and it went into effect the next day. (*People v. Rivera* (2015) 233 Cal.App.4th 1085, 1089.) "Proposition 47 makes certain drug- and theft-

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[1] All statutory references are to the Penal Code.

related offenses misdemeanors, unless the offenses were committed by certain ineligible defendants. These offenses had previously been designated as either felonies or wobblers (crimes that can be punished as either felonies or misdemeanors)." (*Id.* at p. 1091.)

"Proposition 47 also created a new resentencing provision: section 1170.18. Under section 1170.18, a person 'currently serving' a felony sentence for an offense that is now a misdemeanor under Proposition 47, may petition for a recall of that sentence and request resentencing in accordance with the statutes that were added or amended by Proposition 47. (§ 1170.18, subd. (a).) A person who satisfies the criteria in section 1170.18 shall have his or her sentence recalled and be 'resentenced to a misdemeanor … unless the court, in its discretion, determines that resentencing the petitioner would pose an unreasonable risk of danger to public safety.' (§ 1170.18, subd. (b).) Subdivision (c) of section 1170.18 defines the term 'unreasonable risk of danger to public safety,' and subdivision (b) of the statute lists factors the court must consider in determining 'whether a new sentence would result in an unreasonable risk of danger to public safety.' (§ 1170.18, subds. (b), (c).)" (*People v. Rivera*, *supra*, 233 Cal.App.4th at p. 1092.) "Section 1170.18 also provides that persons who have completed felony sentences for offenses that would now be misdemeanors under Proposition 47 may file an application with the trial court to have their felony convictions 'designated as misdemeanors.' (§ 1170.18, subd. (f); see *id.*, subds. (g)-(h).)" (*Id.* at p. 1093.)

A felony conviction for receiving stolen property might be eligible for reduction to a misdemeanor under section 1170.18 if the value of the stolen property did not exceed $950.[2] In this case, as the trial court correctly noted, defendant may re-petition for

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[2] Section 496, subdivision (a) provides: "(a) Every person who buys or receives any property that has been stolen or that has been obtained in any manner constituting theft or extortion, knowing the property to be so stolen or obtained, or who conceals, sells, withholds, or aids in concealing, selling, or withholding any property from the owner, knowing the property to be so stolen or obtained, shall be punished by imprisonment in a

resentencing under section 1170.18. But he bears the initial burden to establish his eligibility for resentencing under Proposition 47. (*People v. Sherow* (2015) 239 Cal.App.4th 875, 880 (*Sherow*).) Resentencing on receiving stolen property is not automatic. Defendant must show he "would have been guilty of a misdemeanor … had [Proposition 47] been in effect at the time of the offense." (§ 1170.18, subd. (a).) If he can show that the value of the property he received did not exceed $950, he may be eligible for resentencing (§ 496, subd. (a)). Defendant should include with his petition evidence proving his eligibility. (*People v. Perkins* (2016) 244 Cal.App.4th 136, 136-137.) The petition "could certainly contain at least [defendant's] testimony about the nature of the items taken" (*Sherow, supra,* at p. 880) and "should describe the stolen property and attach some evidence, whether a declaration, court documents, record citations, or other probative evidence showing he is eligible for relief" (*People v. Perkins, supra,* at p. 140). If defendant makes "the initial showing[,] the court can take such action as appropriate to grant the petition or permit further factual determination." (*Sherow*, *supra*, at p. 880.)

Having undertaken an examination of the entire record, we find no evidence of ineffective assistance of counsel or any other arguable error that would result in a disposition more favorable to defendant.

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county jail for not more than one year, or imprisonment pursuant to subdivision (h) of Section 1170. However, if the value of the property does not exceed nine hundred fifty dollars ($950), the offense shall be a misdemeanor, punishable only by imprisonment in a county jail not exceeding one year, if such person has no prior convictions for an offense specified in clause (iv) of subparagraph (C) of paragraph (2) of subdivision (e) of Section 667 or for an offense requiring registration pursuant to subdivision (c) of Section 290."

DISPOSITION

The trial court's order denying defendant's petition for reduction of his felony convictions to misdemeanors under Proposition 47 is affirmed.